

**United States Department of Labor
Employees' Compensation Appeals Board**

B.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 16-1844
Issued: March 8, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 20, 2016 appellant filed a timely appeal of an August 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.²

ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment for a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 16, 2016 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

FACTUAL HISTORY

On February 21, 2012 appellant filed a claim for a recurrence of disability (Form CA-2a) under OWCP File No. xxxxxx248. He alleged that while driving a tow motor on uneven surfaces his back and legs began to hurt due to the jarring caused by the uneven surfaces. On February 27, 2012 OWCP determined that appellant had sustained a new injury and converted his recurrence claim into a new traumatic injury claim with January 13, 2012 as the date of injury.³ On November 19, 2012 it accepted appellant's claim for aggravation of L4-5 radiculopathy. By letter dated December 4, 2012 OWCP placed appellant on the periodic rolls for temporary total disability beginning November 18, 2012. It paid appellant for the period July 27 to November 17, 2012 with the first regular payment covering the period November 18 to December 15, 2012.⁴

On June 22, 2016 OWCP expanded the acceptance of appellant's claim to include permanent aggravation of left ankle arthritis. It noted that his claim had originally been accepted for L4-5 radiculopathy aggravation.

On June 30, 2016 appellant filed a claim for a schedule award (Form CA-7). Attached to his claim was *The Guides Newsletter Rating Spinal Nerve Extremity Impairment* (6th edition July/ August 2009).

By letter dated July 7, 2016, OWCP notified appellant of the deficiencies of his claim and requested a medical report from his physician assessing his permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) and establishing that he had reached maximum medical improvement (MMI). Appellant was afforded 30 days to provide the requested information.

In response to OWCP's request, appellant submitted a July 28, 2016 report from Dr. Timothy J. Levar, a treating podiatrist. Dr. Levar diagnosed chronic left ankle pain, nonunion left ankle arthrodesis, and permanent ankle arthritis aggravation. Examination findings included pain on ankle plantar flexion and dorsiflexion and diffusion tenderness on palpation across medial, anterior, and lateral ankle joint. Dr. Levar reviewed left ankle x-ray interpretations which showed attempted ankle arthrodesis with screw and staple fixation.

By decision dated August 16, 2016, OWCP denied appellant's claim for a schedule award, finding that the submitted evidence was insufficient to establish permanent impairment to

³ In a November 21, 2012 memorandum to file, OWCP combined OWCP File Nos. xxxxxx248 and xxxxxx419, with the former number listed as the master file number. Under OWCP File No. xxxxxx248, it accepted that a lumbar strain due to a January 20, 1988 employment injury, which was subsequently expanded to include permanent aggravation of his preexisting L4-5, L5-S1 degenerative and herniated discs. By decision dated December 18, 1998, OWCP granted appellant a schedule award for 15 percent left leg permanent impairment and 6 percent right leg permanent impairment. By decision dated December 21, 1999, it granted appellant an additional schedule of 11 percent left lower extremity impairment, resulting in a total 26 percent left lower extremity impairment.

⁴ The employing establishment informed OWCP that appellant was retiring effective January 30, 2016.

a scheduled member resulting from the employment injury. It also found that appellant had not submitted any medical evidence showing that he had reached MMI.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁸

Not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.⁹ It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.¹⁰ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred.¹¹ An impairment description must be in sufficient detail so the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.¹²

ANALYSIS

OWCP accepted appellant's claim for aggravation of L4-5 radiculopathy, which it subsequently expanded to include permanent aggravation of left ankle arthritis. It found that appellant was not entitled to a schedule award and denied his claim by decision dated August 16, 2016. The Board finds that appellant has failed to meet his burden of proof to establish a schedule award.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013; Part 3, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁹ *G.E.*, Docket No. 09-1412 (issued February 17, 2010); *Thomas P. Lavin*, 57 ECAB 353 (2006).

¹⁰ *D.F.*, Docket No. 09-1463 (issued August 12, 2010); *Tammy L. Meehan*, 53 ECAB 130 (2001).

¹¹ *See D.S.*, Docket No. 08-885 (issued March 17, 2009); *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

¹² *C.A.*, Docket No. 13-762 (issued April 1, 2014); *Peter C. Belkind*, 56 ECAB 580 (2005).

On June 30, 2016 appellant filed a claim for a schedule award. To support a schedule award, the file must contain competent medical evidence which shows that he has reached MMI, the date MMI occurred, and which describes the impairment in sufficient detail for the claims examiner to visualize the character and degree of disability, and gives a percentage of impairment based on a specific diagnosis, pursuant to the A.M.A., *Guides*.¹³ If a claimant requests a schedule award, but has not submitted such evidence, the claimant should be requested to submit it.¹⁴ If the claimant does not provide an impairment evaluation from his physician when requested, and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award. If in doubt, the claims examiner should obtain an opinion from an OWCP medical adviser prior to such a denial.¹⁵

The only evidence appellant submitted in support of his schedule award claim was a report from his treating chiropractor, Dr. Levar, diagnosing chronic left ankle pain, nonunion left ankle arthrodesis, and permanent ankle arthritis aggravation. Dr. Levar provided physical examination findings. This evidence does not address whether appellant has reached MMI. Furthermore, this evidence did not provide any information which would allow the claims examiner or the Board to visualize the character and degree of permanent impairment, as he did not attempt to rate appellant's permanent impairment pursuant to the A.M.A., *Guides*. Accordingly, appellant has not established that he has a permanent impairment for schedule award purposes. He has, therefore, not met his burden of proof.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds appellant has not met his burden of proof to establish permanent impairment for a schedule award.

¹³ *Supra* note 8 at Chapter 2.808.5(b).

¹⁴ *Id.* at Chapter 2.808.6(a).

¹⁵ *Id.* at Chapter 2.808.6(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 16, 2016 is affirmed.

Issued: March 8, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board